COLUMBIA LAW REVIEW.

Issued monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM — 35 CENTS PER NUMBER

MARCH, NINETEEN HUNDRED AND SIXTEEN.

NOTES.

DOES AN ACTION FOR TRIPLE DAMAGES UNDER THE SHERMAN ANTI-TRUST LAW SURVIVE THE DISSOLUTION OF A PLAINTIFF CORPORATION?—In the recent case of *Imperial Film Exchange* v. *General Film Co.* (D. C., S. D. N. Y. 1916) not yet reported, the plaintiff, a New York corporation, sought to recover triple damages in an action at law under section seven of the Sherman Anti-Trust Law.[1] After the institution of the suit, the plaintiff was judicially dissolved, and a receiver appointed. Upon motion the receiver was substituted as plaintiff, the court holding that he acquired the right of action by judicial assignment of the assets of the corporation and, since assignability and survivability are convertible terms,[2] in effect determined

[1] 26 Stat. 209, Chap. 647, § 7, reads: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefore * * * and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee."

[2] Zabriskie *v.* Smith (1855) 13 N. Y. 322; Final *v.* Backus (1869) 18 Mich. 218; Selden *v.* Gill etc. Bank (1909) 239 Ill. 67, 87 N. E. 860.

that this cause of action would survive the dissolution of the original plaintiff. Assuming that the dissolution of a corporation is for the purpose of applying the rules governing survival of actions, the legal equivalent of the death of a natural person,[3] it may be asked whether this result can be supported.

Since this action arises under a federal statute and there is no direct provision settling for the United States courts the question of the survivability of actions,[4] the common law becomes applicable.[5] It is frequently said that an action survives which is capable of assignment and conversely, but this manifestly does not help in finding out what actions are survivable. Under the early common law causes of action arising *ex delicto* died with the person while those arising *ex contractu* survived.[6] This rule became unsatisfactory, though comparatively simple of application, and by means of various statutes,[7] which have been substantially re-enacted in the various American jurisdictions and may well be considered part of the common law,[8] aided by judicial interpretation, the law was changed, making the line of demarcation between actions affecting the personal estate, which survived, and those affecting the person, which did not survive.[9] The promulgation of this rule has given rise to profuse litigation to determine whether a given cause of action falls on one side of the line or the other. Of course there was little doubt that actions for assault and battery,[10] slander,[11] libel,[12] and the like, were personal, while *trespass quare clausum fregit*,[13] *trespass de bonis asportatis*,[14]

---

[3]The court considered this immaterial, but assumed it as a fact for the purposes of the argument. See also Matter of Yuengling Brewing Co. (N. Y. 1897) 24 App. Div. 223; Creely *v.* Smith (C. C. 1845) 3 Story 657; 1 Columbia Law Rev., 543.

[4]A federal statute provides that an action shall not abate upon the death of a party "in case the cause of action survives" by law, but there is no definition of survivability. U. S. Rev. Stat., § 955.

[5]Schreiber *v.* Sharpless (1884) 110 U. S. 76, 3 Sup. Ct. 423. Nor are the statutory rules of the state where the cause of action arose applicable. See Baltimore & Ohio R. R. *v.* Joy (1879) 173 U. S. 226, 19 Sup. Ct. 387; Michigan Central R. R. *v.* Vreeland (1913) 227 U. S. 59, 33 Sup. Ct. 192.

[6]Wheatley *v.* Lane (1668) 1 Saunders 216, n. 1; Hambly *v.* Pratt (1776) 1 Cowp. 371, 375; see Lamphere *v.* Hall (1864) 26 How. Pr. 509.

[7]4 Edw. III, c. 27; 4 Wm. IV, c. 42. See Powell *v.* Reese (1839) 7 A. & E. 426; Barrett *v.* Copeland (1848) 20 Vt. 244.

[8]See Huff *v.* Watkins (1883) 20 S. C. 477; Russell *v.* Sanbury (1881) 37 Ohio 372; Holmes *v.* Moore (1827) 22 Mass. 257.

[9]Aylsworth *v.* Curtis (1896) 19 R. I. 517, 34 Atl. 1109; Hayden *v.* Vreeland (1874) 37 N. J. L. 372. See Zabriskie *v.* Smith, *supra*. The rule is often expressed, inaccurately from a historical standpoint, by the familiar maxim, *actio personalis moritur cum persona*. See Lamphere *v.* Hall, *supra*; Miller *v.* Nuckolls (1905) 76 Ark. 485, 89 S. W. 88; King *v.* Southern Ry. (1906) 126 Ga. 794, 55 S. E. 965.

[10]Shields *v.* Rowland (1912) 151 Ky. 136, 151 S. W., 408.

[11]See Miller *v.* Nuckolls, *supra*.

[12]Cummings *v.* Bird (1874) 115 Mass. 346; More *v.* Bennett (N. Y. 1873) 65 Barb. 338; Milwaukee Mut. Fire Ins. Co. *v.* Sentinel Co. (1891) 81 Wis. 207, 51 N. W. 440.

[13]Ten Eyck *v.* Runk (1866) 31 N. J. L. 428.

[14]4 Edw. III, c. 27, *supra*.

trover,[15] etc., affected the "personal estate". But no satisfactory general rule has as yet been formulated by which the two classes of action may be distinguished, and the only practical method of finding out which class includes a given action has been to consult the adjudged cases, catalogued as to the actions involved.

When, however, the question arises in the form taken in the principal case, an attempt must be made, by a consideration of underlying principles, to determine whether the action involved, which is admittedly *sui generis*, affects the person in the sense here used. In the last analysis all classes of action affect the personal estate of the party injured.[16] Even where the right which it is claimed has been violated is the right to personal security or to an unblemished reputation, the consequential injury to the estate of the party complaining may conceivably be due largely to the loss of ability to transact business, disbursements to repair the injury, or loss of profits arising from an impaired reputation. But the fact that there may be an indirect injury to the estate because of the injury to the person, will not place a cause of action arising out of such injury in the category of actions affecting the personal estate.[17] The most accurate method of stating the test of survivability would be: a cause of action survives which is founded on an injury done to some specific personal estate, *i. e.*, some specific *res*, belonging to the complainant.[18]

Now what is the gist of an action to recover triple damages under the Sherman Act? It is the driving of the plaintiff out of business, an injury it is true, to the total wealth of the plaintiff, but affecting the estate of the plaintiff through himself alone and not directly. No specific estate of the complainant has been injured, his business existence alone has been threatened. Fully comparable to such an injury are those arising from deceit or fraudulent representations, conspiracy, or interference with the plaintiff's business. But causes of action founded on these grounds are held not to survive the death of the plaintiff.[19] Although the action under the Sherman Law is not penal for the purposes of applying the Statute of Limitations,[20] the penal character of the action as to two-thirds of the recovery adds force to the contention that the action does not survive.[21]

As a matter of abstract justice it is doubtless a harsh rule that allows a plaintiff to recover if his injury is insufficient to force him into insolvency, while if his business is totally destroyed and the plaintiff happens to be a corporation and is dissolved, or if he is a natural

[15]Jenkins *v.* McConico (1855) 26 Ala. 213.

[16]See Read *v.* Hatch (1837) 36 Mass. 47; Lamphere *v.* Hall, *supra*.

[17]See Rogers *v.* Spence (1844) 13 M. & W. 571; Edmunds *v.* Ill. Cent. R. R. (1877) 80 Fed. 78.

[18]See Read *v.* Hatch, *supra*; Cleland *v.* Anderson (1902) 66 Neb. 252, 92 N. W. 306; but see s. c. (1905) 75 Neb. 273, 105 N. W. 1092.

[19]Conspiracy, Cleland *v.* Anderson, 66 Neb. 252; Frohlich *v.* Deacon (1914) 181 Mich. 255, 148 N. W. 180; interfering with plaintiff's business, Jones *v.* Barmm (1905) 217 Ill. 381, 75 N. E. 505.

[20]City of Atlanta *v.* Chattanooga Foundry Co. (1900) 101 Fed. 900; (1903) 127 Fed. 23; (1906) 203 U. S. 390, 27 Sup. Ct. 65. In this case also, the Supreme Court held that an action under § 7 was not an action for an injury to personal property or real property as the terms were used in the Statute of Limitations then under consideration.

[21]See Moies *v.* Sprague (1870) 9 R. I. 541; Stokes *v.* Stickney (1884) 96 N. Y. 323.

person and dies, all rights of action against the wrongdoer are lost. Yet an exact parallel may be drawn from the undoubted common law rule that an injury which is not fatal gives to the one suffering it a cause of action, but if the death of the complainant results from the injury, the tort feasor escapes all civil liability. Nor can the result be justified on the ground that at the present time assignability and survivability of actions are the rule and their abatement the exception, for this state of the law has been reached almost entirely by the passage of statutes and not by a development of the common law. It well may be that public policy requires that an action under the Sherman Law should survive, but this result would be reached preferably by an express legislative enactment rather than by straining the common law to cover a case not within the scope of actions affecting the personal estate, especially in view of the fact that no specific property of the plaintiff is injured.[22]

ANNULMENT OF MARRIAGE BECAUSE OF INSANITY.—As a valid contract of marriage requires the mutual consent of two persons of sound mind, the courts can annul a marriage because of the mental incapacity of the parties.[1] While this fundamental principle has always been recognized, the authorities have found it difficult to definitely state the degree of sanity necessary to make the marriage valid. At one time it was considered that there must be the same capacity as is required for other contracts.[2] But some jurisdictions did not demand as great a degree of intelligence as is stated in this rule, while others considered that more capacity was necessary for a contract which bound both the person and his property for life than one which related only to property.[3] Perhaps the most widely accepted test is the one by which the parties must be able to understand the nature of the contract and have some idea of the obligations to be assumed.[4] It follows from this doctrine that the insanity must exist at the time the contract is made in order to invalidate it. Thus the fact that a party was

[22]But see Cleland *v.* Anderson (1905) 75 Neb. 273; *cf.* Strout *v.* United Shoe Machinery Co. (1912) 195 Fed. 313. See Fletmann *v.* Welsbach Lighting Co. (U. S. Supreme Court, Oct. Term 1915. Nos. 145 and 146, January 24, 1916) holding that an equity suit cannot be maintained under § 7 of the Sherman Law by a single stockholder to recover threefold damages for injuries to the corporation, when the corporation refuses to sue at law. This effectually disposes of the contention, considered pertinent in the principal case, that a cause of action under § 7 can be reached by the creditors of the injured party, unless that party can be forced to sue for their benefit.

[1]True *v.* Ranney (1850) 21 N. H. 52; Wightman *v.* Wightman (N. Y. 1820) 4 Johns. Ch. 343; see Middleborough *v.* Rochester (1815) 12 Mass. 373; Clark *v.* Fields (1841) 13 Vt. 460. The last case was one where there never was a contract, since the parties thought they were becoming engaged instead of married.

[2]Atkinson *v.* Medford (1859) 46 Me. 510; Anonymous (1826) 21 Mass. 32; Dunphy *v.* Dunphy (1911) 161 Cal. 380, 119 Pac. 112. This also seems to be part of the test in Browning *v.* Reave (1812) 2 Phillim. 69; Cole *v.* Cole (1857) 37 Tenn. 57.

[3]1 Bishop, Marriage, Divorce and Separation, 597, 598.

[4]Meekins *v.* Kinsella (N. Y. 1912) 152 App. Div. 32, 136 N. Y. Supp. 806; see 2 Nelson, Divorce and Separation, § 653. Attempts to refine this broad rule have been made, but without much success. Nelson says the parties must have affection for each other, 2 Nelson, Divorce and Separa-